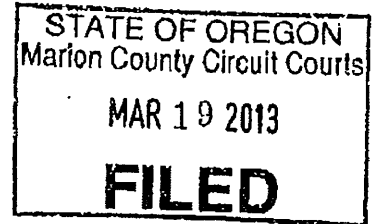


Mar. 18. 2013 9:01AM

No. 4325 P. 2 p. 1



IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MARION

P & B PENCE, LLC, an Oregon limited liability  
company, also with an assumed name PBPC,

Plaintiff,

v.

CHARLES A. SIDES,

Defendant/Third-Party Plaintiff,

v.

KB PACIFIC, LLC, an Oregon Limited Liability  
Company, BRAD PENCE, and PAMELA  
PENCE,

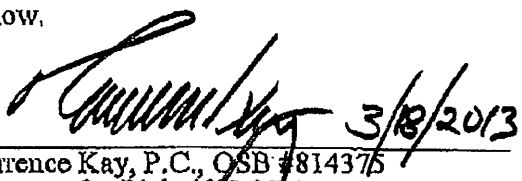
Third-Party Defendants.


Case No. 11C-20216

Judge Albin W. Norblad

**JUDGMENT OF DISMISSAL**

The parties represented by the undersigned attorneys have resolved all matters pursuant to written signed settlement agreement which provides for payments on dates certain to the Plaintiff with rights described in that agreement to reopen this case and enter a Stipulated Judgment in the event a payment due date is dismissed. The Plaintiff's rights under that Agreement are not waived and are recognized despite this Judgment of Dismissal being entered. Based on the foregoing including the settlement agreement, the parties move for entry of the Stipulated Judgment described below.

  
Terrence Kay, P.C., OSB #814375  
Attorney for Plaintiff P&B Pence, LLC and  
Third-Party Defendants Pence

  
William Ghiorso, OSB #902706  
Attorney for Defendant and Third-Party  
Plaintiff Charles A. Sides

Page 1 - Judgment of Dismissal

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TERRENCE KAY, P.C.

Attorney at Law

3155 River Road S., Suite 150 - Salem, OR 97302

Telephone: 503/588-1944 Fax: 503/588-1946

E-mail: [terrence@kaylawfirm.com](mailto:terrence@kaylawfirm.com)

Mar. 18. 2013 9:01AM

No. 4325 P. 3 <sup>P. 2</sup>

1  
2 Based on the foregoing stipulation and the Court being informed of the terms of the  
3 settlement agreement by these parties, it is, without prejudice to Plaintiff's rights to reopen this case  
4 if necessary to enter the stipulated general judgment, hereby

5 **ORDERED** that this case is dismissed with prejudice and without damages, costs or attorney  
6 fees to any party, except the Third-Party Plaintiff Charles Sides claim against Third-Party Defendan  
7 KB Pacific, LLC is dismissed without prejudice.

8 Dated this 19 day of March 2013.

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10  
11 Honorable Albin W. Norblad  
Circuit Court Judge

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13 Approved as to form by attorneys signing above.  
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Page 2 – Judgment of Dismissal

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TERRENCE KAY, P.C.

Attorney at Law

3155 River Road S., Suite 150 - Salem, OR 97302

Telephone: 503/588-1944 Fax: 503/588-1946

E-mail: [terrence@kaylawfirm.com](mailto:terrence@kaylawfirm.com)

### Settlement Agreement

1. Parties. The parties to this Agreement are P & B Pence, LLC, an Oregon limited liability company, Brad Pence, and Pamela Pence (hereinafter individually and collectively the "Pences"), and Charles A. Sides (hereinafter "Sides"), who make this Settlement Agreement (hereafter "Agreement") for good and valuable consideration as set forth in this Agreement.

2. Recitals. The parties state the following as part of their Agreement in releasing all claims against each other as described herein:

2.1 The parties to this Agreement are named parties in an action in the Circuit Court of the State of Oregon for the County of Marion, Case No. 11C-20216, entitled *P & B Pence, LLC, an Oregon limited liability company, also with an assumed name PBPC, v. Charles A. Sides v. KB Pacific, LLC, an Oregon limited liability company, Brad Pence and Pamela Pence*, in which various claims are asserted. This case is hereinafter referred to as the "Lawsuit."

2.2 The parties have compromised and settled all matters between or among them as set forth in this Agreement.

3. Sides Payment to P&B Pence, LLC. Sides shall pay the sum of \$100,000 in two amounts of \$50,000 by the following two due dates: one payment to be made on or before June 3, 2013; and the second payment of \$50,000 on or before August 1, 2013. Sides may extend each payment date by paying to P & B Pence, LLC the amount of \$2,500 before each due date and upon timely payment of that amount, that due date will be extended by fourteen (14) calendar days. The \$2,500 is in addition to and not a payment on the \$50,000 amount. In the event Sides does not pay any amount due by any due date described in this section, then P & B Pence, LLC shall have the right to present for signing and entry on or after the day after the due date to the Oregon Circuit Court for Marion County, the signed Stipulated General Judgment, a copy of which is attached and marked *Exhibit 1*, and the original of which shall be fully signed and delivered to counsel for the Pences upon signing of this Agreement by Sides. P & B Pence, LLC shall also have the right to submit at the same time with the Stipulated Judgment a motion to set aside any dismissal of the Lawsuit which has been entered, for the purpose of then entering the Stipulated General Judgment. If the amounts due as stated in this section are fully and timely paid the original Stipulated General Judgment shall be returned to counsel for Sides and marked as "paid."

4. Full and Complete Waivers and Mutual Releases/Limited Judgment. The parties waive and release their claims against each other as follows:

4.1 By Pences. The Pences release Sides of any and all claims, charges, actions and lawsuits of every nature and kind whatsoever, known or unknown, suspected or unsuspected, past, present or future, which Pences have or might have against Sides, except the payments due as described in the Agreement. This includes any claim which could hereafter be asserted based on any pre-existing conduct, agreement, relationship or knowledge or alleged knowledge or information, including any claim for fraud or misrepresentation to induce the Pences to sign this Agreement. This release includes a release and discharge of any agents, attorneys or insurers, and their successors, individually and collectively, and any and all other persons who might be claimed to be liable, of and from any and all such claims, charges, actions and lawsuits which are hereby released.

4.2 By Sides. Sides hereby waives and releases the Pences of any and all claims, charges, actions and lawsuits of every nature and kind whatsoever, known or unknown, suspected or unsuspected, past, present or future, which he has or might have against the Pences. This includes any claim which could hereafter be asserted based on any pre-existing conduct, agreement, relationship or knowledge or alleged knowledge or information, including any claim for fraud or misrepresentation to induce Sides to sign this Agreement. This release includes a release and discharge of any agents, attorneys or insurers, and their successors, individually and collectively, and any and all other persons who might be claimed to be liable, of and from any and all such claims, charges, actions and lawsuits which are hereby released.

4.3 Judgment of Dismissal. Upon complete signing of this Agreement and the attorneys for the parties shall sign and file the original form of the Judgment of Dismissal, a copy of which is attached as *Exhibit 2*.

5. Pending and/or Future Claims. The foregoing release includes not only pending claims but any future claims of any kind, nature or otherwise which could have been asserted by either party against the other concerning the subject matters described in paragraph 4 arising from or related to conduct prior to the effective date of this Agreement. The Pences and Sides hereby covenant and agree any and all claims, charges, actions of every nature and kind whatsoever, known or unknown, suspected or unsuspected, past, present or future, which any or all of them had or might have against each other arising from or related to conduct prior to the effective date of this Agreement, are hereby waived and released.

6. Non-admission of Liability. Nothing in this Agreement (or the Agreement itself) shall operate or be interpreted as an admission of liability as to any of the claims, charges, actions and lawsuits released hereby except as otherwise stated in this Agreement or Stipulated General Judgment.

7. Authority to Bind. It is understood that the individuals and the LLC executing this Agreement have the authority to bind themselves and the LLC, and do bind themselves by executing this Agreement. This Agreement may be executed in duplicate original counterparts.

8. Final and Binding/Integrated and Entire Agreement. This Agreement contains the entire agreement and understanding between the parties and supersedes and replaces all prior negotiations, representations, and proposed agreements or undertakings, written or oral, and may only be amended by a written document signed by the duly authorized representatives of the parties which specifically states that it was intended as an amendment. There are no representations, understandings or agreements of any kind except as strictly set forth in this Agreement. The only inducements to enter this Agreement are set forth in this Agreement. This Agreement shall inure to the benefit of each party and their successors and assigns. The terms of this Agreement are contractual and not a mere recital. The recitals are material parts of this Agreement. The captions are for reference only.

9. Severability. If any term, sentence, provision, covenant or condition of this Agreement is declared invalid, void or unenforceable, the balance of the provisions shall remain in full force and effect.

10. Controlling Law. This Agreement will be interpreted, enforced and governed by the law of the State of Oregon exclusively in the Circuit Court of Marion County.

11. Complete Defense and Indemnification. The parties understand and agree that this Agreement may be used by either of them as a complete defense to any claim or entitlement that either of them or anyone else may subsequently assert against them for or on account of any matter or thing whatsoever arising out of the matters which are released as set forth herein.

12. Materiality of All Conditions and Obligations. The parties understand and acknowledge that all of the provisions, conditions, and obligations in this Agreement are material and that the non-occurrence or breach of any such condition or obligation by each is not allowed and shall result in each being entitled to assert any and all rights it may have in law or equity.

13. Full Knowledge and Volition. The parties acknowledge that they have read this Agreement, understand its meaning and intent, and have signed the Agreement of their own free act and volition with consultation from an attorney of his or its choice. Each party has been represented by counsel of his or its choosing and having had the full opportunity to consult with and be advised by counsel, each party agreed to the settlement of this matter and the signing of this Agreement, and represents and agrees he or it has not been induced to enter this Agreement by anything other than the promises, terms and conditions set forth in this Agreement, and has relied on the benefit of counsel in deciding to sign this Agreement.

14. Facsimile or PDF Copy and Counterparts. The parties agree that a facsimile or PDF copy of this Agreement which has been signed is binding on them, and that this Agreement may be signed in counterparts without affecting its validity or enforceability. Each party shall sign two original counterparts and provide one original to the other parties through their counsel.

15. Number, Gender and Captions. As used herein, the singular shall include the plural, and the plural the singular. The masculine and neuter shall each include the masculine, feminine, and neuter, as the context so requires. All captions used herein are intended solely for the convenience of reference and shall in no way limit any of the provisions of this Agreement. The parties agree that this Agreement is a jointly authored document, which shall not be construed in favor of one party as against the other on the basis of a claim that one party drafted this Agreement.

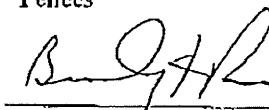
16. Counting of Days. Whenever a time period set forth in this Agreement would otherwise expire on other than a business day, such time period shall be deemed extended to the next following day which is a business day.

17. Effective Date. The parties agree that this Agreement shall be effective on March 15, 2013, although signed after that date by the signatories and the attorneys signing below approving this Agreement "as to form," and shall be effective only after fully signed.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates signed below in 2013.


WARNING! THIS IS A RELEASE! READ IT CAREFULLY AND HAVE IT REVIEWED BY AN ATTORNEY BEFORE SIGNING!

"Pences"

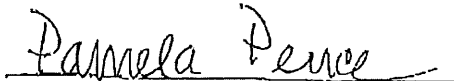
  
Brad Pence, individually

3/18/13  
Date

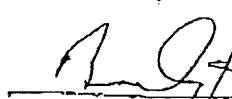
"Sides"

  
Charles A. Sides, individually

Date

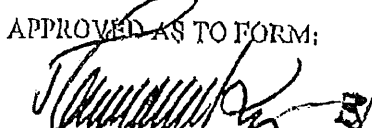
  
Pamela Pence, individually

3/18/13  
Date


  
Brad Pence, Member  
P & B Pence, LLC

3/18/13  
Date

APPROVED AS TO FORM:

  
Terrence Kay, P.C., OSB# 814375  
Attorney for Pences

3/18/2013

  
William Ghiorso, OSB# 902706  
Attorney for Sides

**TERRENCE KAY, P.C.**

*Attorney at Law*

3155 River Road S., Suite 150  
Salem, Oregon 97302  
Telephone: (503) 588-1944  
Fax: (503) 588-1946

June 18, 2013

Honorable Albin W. Norblad  
Marion County Courthouse  
PO Box 12869  
Salem OR 97309

*via hand delivery*

Re: *Pence v. Sides*  
Marion Circuit Case No. 11C-20216  
My File: Pence/Correspondence

Dear Judge Norblad:

Plaintiff seeks immediate entry at *ex parte* as agreed by the parties in their written Settlement Agreement of the attached Order Setting Aside the prior dismissal because as it was stated in the written Agreement, if the Defendant did not make a payment by June 3, Plaintiff could immediately apply at *ex parte* for an order setting aside the prior dismissal of this case to allow entry of the attached Stipulated Judgment. My Declaration sets forth these facts with a true copy of Plaintiff's Declaration unless I have obtained the original, and includes a true copy of the Settlement Agreement with highlighting of the pertinent provision.

If we could please be informed by the Court staff if the Order and Stipulated Judgment were signed, it would be greatly appreciated. I am having this delivered to the Court by my clerk because I have to be out of town in another court this morning on another case and could not be personally present, but did not want to delay given all the delay my client has been through with the Defendant.

Thank you for the Court's consideration.

Cordially,



TERRENCE KAY, P.C.

(E-mail: [terrence@kaylawfirm.com](mailto:terrence@kaylawfirm.com))

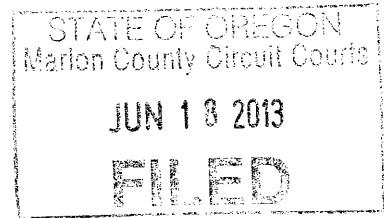
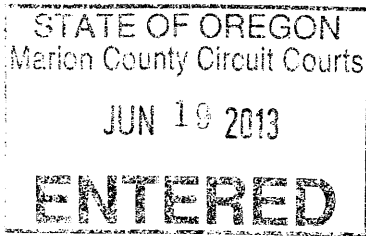
TK/su

Enclosures

cc: William Ghiorso w/encls (*via fax*)

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*lets give Ghiorso five days  
to object*



5  
6  
7 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
8 FOR THE COUNTY OF MARION

9 P & B PENCE, LLC, an Oregon limited liability  
10 company, also with an assumed name PBPC,

11 Plaintiff,

12 v.

13 CHARLES A. SIDES,

14 Defendant/Third-Party Plaintiff,

15 v.

16 KB PACIFIC, LLC, an Oregon Limited Liability  
17 Company, BRAD PENCE, and PAMELA  
18 PENCE,

19 Third-Party Defendants.

Case No. 11C-20216

Judge Albin W. Norblad

**PLAINTIFF MOTION TO SET ASIDE  
JUDGMENT OF DISMISSAL FOR  
ENTRY OF STIPULATED JUDGMENT**

*Ex Parte*

20 Plaintiff moves to set aside the prior Judgment of Dismissal of this case entered March 19,  
21 2013 (a true copy is attached), based on the parties signed Settlement Agreement which gives  
22 Plaintiff this right, so the Stipulated Judgment Defendant signed can be entered. If Defendant did  
23 not pay the agreed upon amount by June 3, 2013, which was extended to June 17, 2013, Plaintiff has  
24 the right to immediately seek an order setting aside the prior dismissal of this case for immediate  
25 entry of the Stipulated Judgment signed by the Defendant and his attorney. A true copy of the  
26 Settlement Agreement is attached to the Declaration by Plaintiff's Counsel in which Section 3  
Page 1 – Plaintiff Motion to Set Aside Judgment of Dismissal for Entry of Stipulated Judgment

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**TERRENCE KAY, P.C.**

*Attorney at Law*

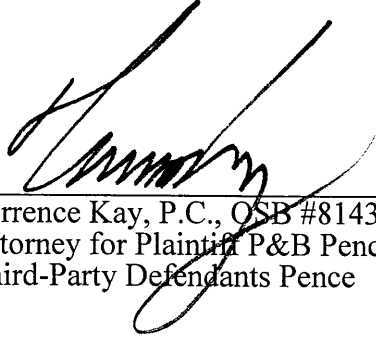
3155 River Road S., Suite 150 - Salem, OR 97302

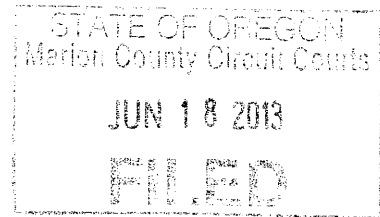
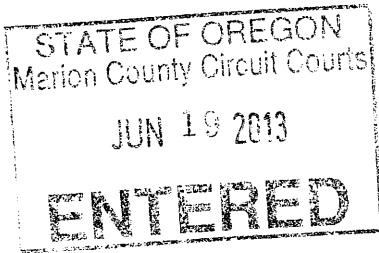
Telephone: 503/588-1944 Fax: 503/588-1946

E-mail: [terrence@kaylawfirm.com](mailto:terrence@kaylawfirm.com)

1 provides for the dismissal to be set aside for entry of the original Stipulated Judgment which is also  
2 filed with this Motion. No payment was received as required under the Agreement. See the  
3 separately filed Declaration of Bradley Pence. A form of Order is attached for signing with the  
4 Stipulated Judgment.

5 Dated this 18<sup>th</sup> day of June 2013.

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8 Terrence Kay, P.C., OSB #814375  
9 Attorney for Plaintiff P&B Pence, LLC and  
10 Third-Party Defendants Pence  
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5  
6 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
7 FOR THE COUNTY OF MARION

8 P & B PENCE, LLC, an Oregon limited liability  
9 company, also with an assumed name PBPC,

10 Plaintiff,

11 v.

12 CHARLES A. SIDES,

13 Defendant/Third-Party Plaintiff,

14 v.

15 KB PACIFIC, LLC, an Oregon Limited Liability  
16 Company, BRAD PENCE, and PAMELA  
17 PENCE,

Third-Party Defendants.

Case No. 11C-20216

Judge Albin W. Norblad

**DECLARATION BY PLAINTIFF  
COUNSEL TERENCE KAY IN  
SUPPORT OF MOTION TO SET ASIDE  
DISMISSAL FOR ENTRY OF  
STIPULATED JUDGMENT**

18 I, Terrence Kay, hereby declare:

19 1. I am the attorney for the Plaintiff and Third-Party Defendants in this case and make this  
20 Declaration on my personal knowledge unless otherwise stated.

21 2. A true copy of the Agreement signed by the parties with approval by counsel is attached.  
22 Paragraph 3 gives Plaintiff the right to immediately seek at *ex parte* an order setting aside the prior  
23 dismissal and allowing immediate entry of the Stipulated Judgment.

24 3. As stated by the Plaintiff in the Declaration of Bradley Pence, no payment required under  
25 this Agreement was received by the Plaintiff from the Defendant by the June 17<sup>th</sup> deadline. The

26 Page 1 – Declaration by Plaintiff Counsel Terrence Kay in Support of Motion to Set Aside Dismissal  
For Entry of Stipulated Judgment

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**TERRENCE KAY, P.C.**

*Attorney at Law*

3155 River Road S., Suite 150 - Salem, OR 97302

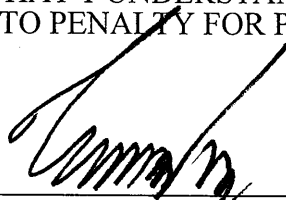
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E-mail: [terrence@kaylawfirm.com](mailto:terrence@kaylawfirm.com)

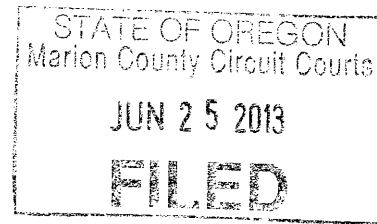
1 Agreement Section 3 states if payment was not made by June 3<sup>rd</sup> Plaintiff "shall have the right to  
2 present for signing and entry on or after the due date (June 3) to the Oregon Circuit Court for Marion  
3 County, the signed Stipulated General Judgment ... and have a right to submit at the same time ... a  
4 motion to set aside any dismissal of the Lawsuit which has been entered ..."

5 I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF  
6 MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS  
EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

7 Dated this 18<sup>th</sup> day of June 2013.



8  
9 Terrence Kay, P.C., OSB #814375  
10 Attorney for Plaintiff P&B Pence, LLC and  
11 Third-Party Defendants Pence  
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5 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
6 FOR THE COUNTY OF MARION

7 P & B PENCE, LLC, an Oregon limited liability  
8 company, also with an assumed name PBPC,

9 Plaintiff,

10 v.

11 CHARLES A. SIDES,

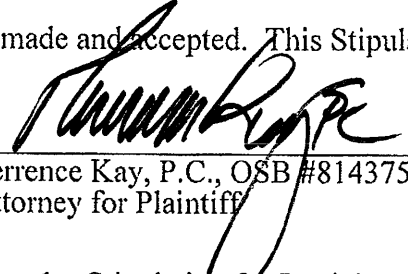
12 Defendant.

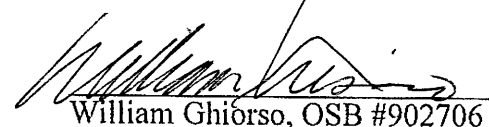
Case No. 11C-20216

Judge Albin W. Norblad

**STIPULATION FOR PARTIAL  
PAYMENT**

13 The parties stipulate by and through their attorneys signing below that Plaintiff will accept a  
14 payment from Defendant of \$2,500 to extend the due date from June 3, 2013 to June 17, 2013, for  
15 the first payment of \$50,000 due under the parties Settlement Agreement dated March 18, 2013, in  
16 accordance with section 3 of that Agreement, if the payment of \$2,500 is made payable to "Terrence  
17 Kay, Lawyer Trust Account," is delivered to the office of Terrence Kay not later than 3:00 p.m.  
18 Wednesday, June 5, 2013, that payment is honored and clears the bank upon deposit if not paid in  
19 cash, and this Stipulation is signed and dated by the attorney for Defendant and delivered on or  
20 before the payment is delivered to the office of Terrence Kay. The parties further stipulate and agree  
21 through their attorneys that the Agreement remains unchanged, in effect and acceptance of this late  
22 payment is not a modification of anything under the Agreement except the date this \$2,500 payment  
23 is made and accepted. This Stipulation may be filed in Court by Plaintiff.

24  6/5/13  
25 Terrence Kay, P.C., OSB #814375 Date  
26 Attorney for Plaintiff

 6/5/13  
William Ghiorsio, OSB #902706 Date  
Attorney for Defendant

Page 1 – Stipulation for Partial Payment

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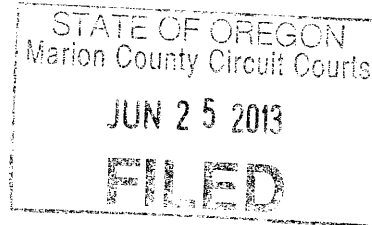
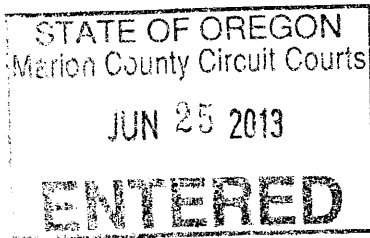
**TERRENCE KAY, P.C.**

*Attorney at Law*

3155 River Road S., Suite 150 - Salem, OR 97302

Telephone: 503/588-1944 Fax: 503/588-1946

E-mail: [terrence@kaylawfirm.com](mailto:terrence@kaylawfirm.com)



6 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
7 FOR THE COUNTY OF MARION

8 P & B PENCE, LLC, an Oregon limited liability  
9 company, also with an assumed name PBPC,

10 Plaintiff,

11 v.

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17 PENCE,

Third-Party Defendants.

Case No. 11C-20216

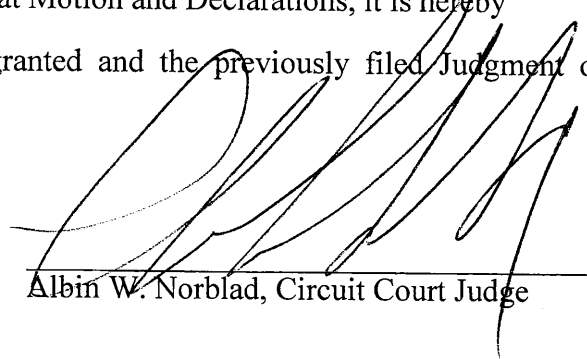
Judge Albin W. Norblad

**ORDER SETTING ASIDE JUDGMENT  
OF DISMISSAL TO ALLOW ENTRY OF  
STIPULATED JUDGMENT**

18 Before the Honorable Albin W. Norblad came the Plaintiff Motion to Set Aside Judgment of  
19 Dismissal to allow Entry of Stipulated Judgment, and the supporting Declarations of Plaintiff and its  
20 Counsel Terrence Kay. Upon review of that Motion and Declarations, it is hereby

21 **ORDERED** that the Motion is granted and the previously filed Judgment of Dismissal  
22 entered March 19, 2013, will be set aside.

23 Dated this 25 day of June 2013.

24  
25   
26 Albin W. Norblad, Circuit Court Judge

Prepared and submitted by:  
Terrence Kay, P.C., OSB #814375  
Attorney for Plaintiff P&B Pence, LLC

Page 1 – Order Setting Aside Judgment of Dismissal to Allow Entry of Stipulated Judgment

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**TERRENCE KAY, P.C.**

*Attorney at Law*

3155 River Road S., Suite 150 - Salem, OR 97302

Telephone: 503/588-1944 Fax: 503/588-1946

E-mail: [terrence@kaylawfirm.com](mailto:terrence@kaylawfirm.com)

1                                    **UTCR 5.100 SUBMISSION OF PROPOSED ORDER**

2            I certify compliance with UTCR 5.100 to the extent it applies to the foregoing Order as  
3 follows pertaining to the box which is checked off: ☒ Plaintiffs' counsel moves for good cause for  
4 relief from the UTCRs for prior submission of this Order to opposing counsel based on the timing  
5 and circumstances presented in the cover letter and Order. ☐ By leave sought from the Court.  
6 ☐ The foregoing Order was served on opposing counsel not less than three days prior to  
7 submission to the court. ☐ Opposing counsel has stipulated that no objection exists as to the form  
8 of this Order. ☐ This Order was mailed to any unrepresented party at the party's last known  
9 address not less than seven (7) days prior to the submission to the court. ☐ This Order will be or  
10 has been presented in open court with the parties present.

11                                    **CERTIFICATE OF SERVICE AND CONFERRING UNDER UTCR 5.010 et. seq.**

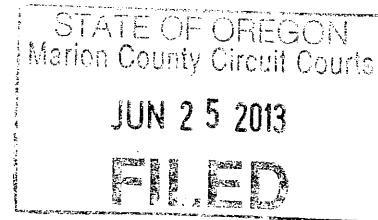
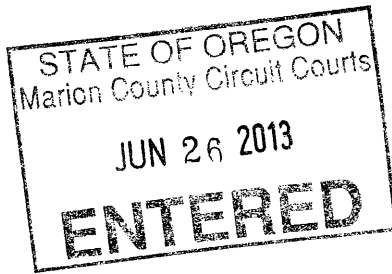
12            I certify compliance with UTCR 5.010 *et. seq.* to the extent it applies by conferring with  
13 opposing counsel before filing this document, or if this box is checked off ☐ based on the facts set  
14 forth in or with this filing showing good cause for not conferring, and further, that I served the  
15 foregoing document(s) on the following individual(s) on the date noted below by ☐ mailing,  
16 ☒ faxing, ☐ emailing, and/or ☐ delivering a true copy thereof, certified by me as such, and if  
17 applicable, contained in a sealed envelope, with necessary postage paid, addressed to the below  
18 individual(s) at said individual(s)' last known address, or in person, to-wit:

19            William Ghiorso  
20            Attorney at Law  
21            495 State Street, Suite 500  
22            Salem OR 97301  
23            Fax: 503.362.1158

24            Dated this 18<sup>th</sup> day of June 2013.



25            Terrence Kay, P.C., OSB #814375  
26            Attorney for Plaintiff P&B Pence, LLC and  
                 Third-Party Defendants Pence



IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MARION

P & B PENCE, LLC, an Oregon limited liability  
company, also with an assumed name PBPC,

Plaintiff,

v.

CHARLES A. SIDES,

Defendant/Third-Party Plaintiff,

v.

KB PACIFIC, LLC, an Oregon Limited Liability  
Company, BRAD PENCE, and PAMELA  
PENCE,

Third-Party Defendants.

Case No. 11C-20216

Judge Albin W. Norblad

**STIPULATED GENERAL JUDGMENT  
(MONEY AWARD)**

Based on the Stipulation for Entry of General Judgment signed below by Defendant Charles A. Sides, his attorney and the attorney for Plaintiff and Third-Party Defendants Brad and Pamela Pence, it is hereby

**ORDERED AND ADJUDGED** that Plaintiff is awarded the following money award in its favor against Defendant Charles A. Sides for the amounts set forth below in this Judgment:

Page 1 – Stipulated General Judgment (Money Award)

F:\PENCE-BRAD\StipGenJdgt031513.1su.doc

TERRENCE KAY, P.C.

Attorney at Law

3155 River Road S., Suite 150 - Salem, OR 97302

Telephone: 503/588-1944 Fax: 503/588-1946

E-mail: [terrence@kaylawfirm.com](mailto:terrence@kaylawfirm.com)

**MONEY AWARD**

1. The name and address of the judgment creditor is:

P & B Pence, LLC  
3781 Shropshire Way S.  
Salem, Oregon 97302

2. The name, address, number of the judgment creditor's attorney is:

Terrence Kay  
Terrence Kay, P.C.  
3155 River Road S, Suite 150  
Salem, Oregon 97302  
Telephone: 503.588.1944

3. The name of the judgment debtor, date of birth, Social Security number, and driver's license, as well as the state that issued the driver's license to the extent known are:

Charles A. Sides  
245 13<sup>th</sup> Street NE  
Salem, Oregon 97301  
SS# (last four digits): Unknown  
ODL: Unknown  
DOB: Unknown

4. The name, address, number of the judgment creditor's attorney is:

William Ghiorso  
Attorney at Law  
495 State Street, Suite 500  
Salem, Oregon 97301  
Telephone: 503.362.8966

5. The principal amount of the Judgment is \$100,000.

6. Pre-judgment interest shall accrue at 9% simple interest per annum from March 15, 2013 and is not included in the principal amount above.

7. Plaintiff shall be awarded all reasonable attorney fees, costs and disbursements which are incurred after March 15, 2013, and for collection until Plaintiff is fully paid, to be awarded by application to the Court and allowed and entered by the entry of supplemental judgment(s) until all amounts owed to Plaintiff are collected and paid.

Page 2 ~ Stipulated General Judgment (Money Award)

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**TERRENCE KAY, P.C.**

*Attorney at Law*

3155 River Road S., Suite 150 - Salem, OR 97302

Telephone: 503/588-1944 Fax: 503/588-1946

E-mail: [terrence@kaylawfirm.com](mailto:terrence@kaylawfirm.com)

1 8. Post-judgment interest at 9% per annum from the date this Judgment is entered shall  
2 accrue on the principal amount in paragraph 5 above with all payments or amounts collected applied  
3 first to accrued interest on the principal amount stated in paragraph 5 and any supplemental  
4 judgment(s), then to the principal amount in paragraph 5, and then to any amounts awarded by  
5 Supplemental Judgment(s).

6 Dated this 28 day of June 2013.

7  
8  
9 Honorable Albin W. Norblad  
Circuit Court Judge

10 I, Charles A. Sides, stipulate to this General Judgment:

11  
12 Charles A. Sides

Date

13 This Stipulated General Judgment is approved as to form by:

14  
15 Terrence Kay, P.C., OSB #814375 Date 3/18/2013  
16 Attorney for Plaintiff P&B Pence, LLC and  
17 Third-Party Defendants Pence

18  
19 William Ghiorso, OSB #902706 Date  
20 Attorney for Defendant and Third-Party  
21 Plaintiff Charles A. Sides  
22  
23  
24  
25  
26

Page 3 – Stipulated General Judgment (Money Award)

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TERRENCE KAY, P.C.

Attorney at Law

3155 River Road S., Suite 150 - Salem, OR 97302

Telephone: 503/588-1944 Fax: 503/588-1946

E-mail: [terrence@kaylawfirm.com](mailto:terrence@kaylawfirm.com)



1  
2 ENTERED

3 AUG 24 2011

4 Marion County Circuit Court

5  
6 IN THE CIRCUIT COURT OF THE STATE OF OREGON

7 FOR THE COUNTY OF MARION

8 P & B PENCE, LLC, an Oregon limited liability  
9 company, also with an assumed name PBPC,

10 Plaintiff,

11 v.

12 CHARLES A. SIDES,

13 Defendant.

Case No. 11C-20216

Judge Dennis J. Graves

**FIRST AMENDED COMPLAINT**

*(Breach of Contract)*

Prayer Amount: \$100,000 plus interest

**Not Subject to Mandatory Arbitration**

14  
15 Plaintiff files this First Amended Complaint and alleges as follows:

16 1.

17 Plaintiff P & B Pence, LLC is an Oregon limited liability company in good standing with the  
18 State of Oregon, which has also used the assumed name PBPC.

19 2.

20 Defendant Charles A. Sides is an individual residing in Marion County, (hereinafter  
21 "Sides").

22 3.

23 Defendant Sides signed a Promissory Note (hereinafter "Note") dated November 4, 2008,  
24 and received an advance of \$100,000 on that Note November 6, 2008. A true copy of the Note is  
25 attached as *Exhibit 1* and incorporated by reference. The Note was duly assigned by Bradley K. and  
26

Page 1 – First Amended Complaint

TERRENCE KAY, P.C.

Attorney at Law

3155 River Road S., Suite 150 - Salem, OR 97302

Telephone: 503/588-1944 Fax: 503/588-1946

E-mail: [terrence@kaylawfirm.com](mailto:terrence@kaylawfirm.com)

1 Pamela Pence to Plaintiff P & B Pence, LLC for collection and enforcement including the filing of  
2 this Complaint.

3  
4 4.

5 The principal sum of \$100,000 advanced under the Note accrued interest at the rate of eight  
6 percent (8%) per annum from the date of disbursement November 6, 2008, through the term of the  
7 Note which contains a Maturity Date for the Note of January 31, 2009. The principal sum was then  
8 subject under the Note to an increase of the eight percent (8%) per annum rate by an additional five  
9 percent (5%) rate to a thirteen percent (13%) per annum rate after the Maturity Date, beginning  
10 February 1, 2009 until the principal sum and all interest and other amounts due under the Note are  
11 fully paid. The Note also provides a late charge for the failure to pay the Note within ten (10) days  
12 of the Maturity Date in the amount of a late charge equal to five percent (5%) of the delinquent  
amount, which is at least \$5,000.

13  
14 5.

15 Defendant Sides has failed to pay the amounts owing and due under the Note which includes  
16 the principal amount of \$100,000 and accrued interest on that principal sum of \$35,147.22 through  
August 22, 2011, with \$36.1111 per diem thereafter until fully paid, and the late fee of \$5,000.

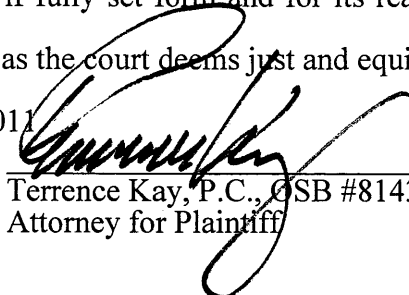
17  
18 6.

19 Defendant Sides is also liable pursuant to the Note for Plaintiff's reasonable attorney fees,  
20 disbursements, costs and expenses with interest thereon until fully paid with all payments applied  
first to accrued interest and thereafter to the principal amount owed.

21  
22 7.

23 WHEREFORE, Plaintiff prays for judgment in its favor against Defendant as set forth  
24 hereinabove and incorporated herein as if fully set forth and for its reasonable attorney fees, costs  
and disbursements, and such other relief as the court deems just and equitable.

25 Dated this 23 day of August 2011

26   
Terrence Kay, P.C., OSB #814375  
Attorney for Plaintiff

Page 2 – First Amended Complaint

TERRENCE KAY, P.C.

Attorney at Law

3155 River Road S., Suite 150 - Salem, OR 97302

Telephone: 503/588-1944 Fax: 503/588-1946

E-mail: [terrence@kaylawfirm.com](mailto:terrence@kaylawfirm.com)

**PROMISSORY NOTE**

November 4, 2008

\$ 200,000.00

**BORROWER:** Charles A Sides

**LENDER:** Bradley K and Pamela Pence

**Promise to Pay.** For value received, the undersigned Borrower promises to pay to the order of the Lender in lawful money of the United States and immediately available funds, any sums advanced under this Note plus interest on the unpaid portion of the principal sum and all Expenses (defined below).

**Nature of Facility.** Subject to the terms and conditions of this Note, Lender agrees to lend to Borrower on a revolving basis such sums as Borrower may from time to time request, subject to the limitation set forth below, not to exceed in the aggregate at any one time outstanding the sum of TWO HUNDRED THOUSAND DOLLARS (\$200,000.00). Within such limits of time and amount, Borrower may borrow, in installments of 100,000.00 on two consecutive weeks as needed.

**Advances Under Revolving Loan.** Advances by Lender under this Note shall be made by deposits or wire transfers of immediately-available funds pursuant to wire transfer instructions to be delivered by Borrower to Lender. Each Request for an Advance must be accompanied by such financial information as may be requested by Lender, which information must be acceptable to Lender in its sole and absolute discretion. The intended use of the Advance will be to lend to Keith Brown Building Materials (KB) the funds received in anticipation of a pending acquisition deal between KB and Mr. Sides. Lender shall have no obligation to make any Advance if any Event of Default exists or any condition or event exists that, with notice, the passage of time or both, would constitute an Event of Default. Any fees, charges or expenses charged to Lender by any other bank for transferring Advances made by Lender pursuant to a Request must be paid by Borrower and shall be charged against this Note as accrued, as a debit to the ledger.

**Interest.** The Borrower shall pay to the Lender interest, calculated on the basis of a 360-day year for the actual number of days of each year (365 or 366) as follows:

From and including the date the proceeds of this Note are disbursed to and not including the Maturity Date (defined below), the outstanding principal sum shall accrue interest at an interest rate of eight percent (8%) per annum.

**Maximum Legal Rate.** It is the intent of the Lender and the Borrower that in no event shall such interest be payable at a rate in excess of the maximum rate permitted by applicable law (the "Maximum Legal Rate"). Solely to the extent necessary to prevent interest under this Note from exceeding the Maximum Legal Rate, any amount that would be treated as excessive under a final judicial interpretation of applicable law shall be deemed to have been a mistake and automatically canceled and if received by the Lender shall be refunded to the Borrower.

**Default Rate.** Upon and after the Maturity Date of the occurrence or existence of an Event of Default, the interest rate on the unpaid principal sum shall be increased to five percent (5%) per year above the otherwise applicable rate per year, effective as of the date of the default or maturity. No failure to impose

or delay in imposing this Default Rate shall be construed as a waiver by the Lender of its right to collect interest at the Default Rate for the period from the Maturity Date of the commencement of the default, as applicable, to but not including the earlier of the date (a) the default is cured to the satisfaction of the Lender in its sole discretion; or (b) this Note is paid in full.

**Term.** This Note shall be paid in full with principle and interest at the time of the funding and proposed acquisition of stock in Keith Brown Building Materials if not otherwise paid the Maturity Date of this Note shall be January 31, 2009

**Repayment.** Borrower shall pay to Lender in full all accrued and unpaid principal, interest, and Expenses on the Maturity Date.

**Late Charge.** If the Borrower fails to pay within ten (10) days of its due date any amount owing pursuant to this Note, the Borrower shall immediately pay to the Lender a late charge equal to five percent (5%) of the delinquent amount.

**Application of Payments.** Each payment pursuant to this Note shall be applied first to accrued and unpaid interest, next to Principal, next to late charges, and finally to Expenses.

**Events of Default; Acceleration.** In the event of Default under this Note all amounts under this Note shall become immediately due and payable without any notice, demand, presentment or protest of any kind (each of which is waived by the Borrower) (a) if the Borrower commences any bankruptcy or insolvency proceeding, in voluntary, and upon the lapse of sixty (60) days without dismissal if involuntary; (b) at the sole option of the Lender, upon or at any time or from time to time after the occurrence or existence of any other event or condition of Default and the passage of any applicable grace period; and (c) at the sole option of the Lender, upon or at any time after the Maturity Date, regardless of whether the Lender has accepted any partial payments subsequent to the Maturity Date.

**Authorized Representative.** This Note is issued by Borrower to Lender in connection with a loan limit made available by Lender to Borrower (the "Credit"). Lender may make any advance pursuant to the Credit (the 'Advance(s)') in reliance upon any oral, telephonic, written, tele-transmitted or other request (the 'Request(s)') that Lender in good faith believes to be valid and to have been made by Borrower or on behalf of Borrower by an authorized person. Lender may act on the Request of such a person until Lender shall have received from Borrower, and had a reasonable time to act on, written notice revoking the authority of such person. Lender shall incur no liability to Borrower or to any other person as a direct or indirect result of making any Advance pursuant to this paragraph.

**Lender Records Conclusive.** Lender shall set forth on a schedule maintained on a computer, the date and original principal amount of each Advance, the date and amount of any fees, charges or expenses debited against this Note. No failure by Lender to make, and no error by Lender in making, any annotation on any such schedule shall affect Borrower's obligation to pay the principal and interest of each Advance or any other obligation of Borrower to Lender pursuant to this Note.

**Purpose.** Borrower certifies that all Advances shall be used to lend to Keith Brown Building Materials for working capital, and not for any personal, or any other business purpose.

**Expenses.** The Borrower shall pay to the Lender or its agents on demand each cost and expense (including, but not limited to, the reasonable fees and disbursements of counsel to the Lender or its agents, whether internal or external and whether retained for advice, for litigation or for any other purpose) incurred by the Lender or its agents either directly or indirectly in connection with this Note including, without limitation, endeavoring to(1) collect any amount owing pursuant to this Note or

negotiate or document a workout or restructuring; (2) enforce or realize upon any guaranty, endorsement or other assurance, any collateral or other security, or any subordination, directly or indirectly securing or otherwise directly or indirectly applicable in any such amount; or (3) preserve or exercise any right or remedy of the Lender or its agents pursuant to this Note (collectively, the "Expenses")

**Joint and Several.** If the Borrower is more than one legal person, each such person is jointly and severally liable for all amounts which become due under this Note, and the term "Borrower" shall include each as well as all of them.

**Cumulative Nature of the Lender's Rights and Remedies.** All rights and remedies of the Lender under applicable law, this Note or any related agreement, guaranty or other document are cumulative and not exclusive. No single, partial or delayed exercise by the Lender of any right or remedy shall preclude subsequent exercise by the Lender at any time of any right or remedy of the Lender without notice. No course of dealing or other conduct, no oral agreement or representation made by the Lender or usage of trade shall operate as a waiver of any right or remedy of the Lender. No waiver of any provision of this Note shall be effective unless made specifically in writing by the Lender.

**Miscellaneous.** This Note, and related security agreements, guaranties and notes, contains the entire agreement between the Lender and the Borrower with respect to this Note and supersedes every course of dealing, other conduct, oral agreement and representation previously made by the Lender. No amendment of any provision of this Note shall be effective unless specifically agreed to in writing by the Lender and the Borrower. This Note shall be governed by the laws of the State of Oregon, without regard to its principles of conflict of laws. This Note is a binding obligation enforceable against the Borrower and its successors and assigns and shall inure to the benefit of and be enforceable by the Lender and its successors, assigns and its agents. If a court deems any provision of this Note invalid, the remainder of this Note shall remain in effect. Section headings are for convenience only. Singular number includes plural and neuter gender includes masculine and feminine as appropriate.

**Borrower's Waivers and consents.** In any action or other legal proceeding relating to this Note, the Borrower (1) consents to the personal jurisdiction of any state or federal court located in the State of Oregon; and (2) agrees that in any legal proceeding, a copy of this Note kept in the Lender's course of business may be admitted into evidence as an original.

**Statutory Notice.** UNDER OREGON LAW, MOST AGREEMENTS, PROMISES AND COMMITMENTS MADE BY US AFTER OCTOBER 3, 1989, CONCERNING LOANS AND OTHER CREDIT EXTENSIONS WHICH ARE NOT FOR PERSONAL, FAMILY OR HOUSEHOLD PURPOSES OR SECURED SOLELY BY THE BORROWER'S RESIDENCE MUST BE IN WRITING, EXPRESS CONSIDERATION AND BE SIGNED BY US TO BE ENFORCEABLE.

BORROWER:

Chuck Sides

By: 

March 10, 2011

Mr. Chuck Sides  
245 13<sup>th</sup> Street NE  
Salem, OR 97301

Mr. Chuck Sides  
P.O. Box 2087  
Salem, OR 97308

Dear Chuck,

This letter is about the promissory note you gave us for the money loaned. I have attached a copy of the original note you signed when we loaned you the \$100,000.00. I have also attached a copy of that check to you. Since this note has been due and we have cooperated with you allowing time for you to arrange financing or whatever is needed to pay this note off, I would like you to confirm that this promissory note is due and owing by signing and dating this letter to confirm the attached promissory note is due and owing. Although we have been allowing you time to pay this without pursuing payment, the note remains due and owing as this time and you have no dispute about the principal amount of \$100,000 with interest according to the note also being due. Thank you.

Sincerely,

Brad Pence  
3781 Shropshire Way S  
Salem, OR 97302

Enclosures

By signing, I confirm the above:

Chuck Sides

Date

ENTERED  
SEP 27 2011  
Marion County Circuit Court

STATE OF OREGON  
MARION COUNTY COURTS

SEP 26 2011

FILED

IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MARION

P&B PENCE, LLC, an Oregon limited  
liability company, also with an assumed name  
PBPC,

Plaintiff,

v.

CHARLES A. SIDES,

Defendant/Third Party Plaintiff

v.

KB PACIFIC, LLC, an Oregon Limited  
Liability Company, BRAD PENCE, and  
PAMELA PENCE,

Third Party Defendants

Case No.: 11C20216

**ANSWER WITH AFFIRMATIVE  
DEFENSES**

**THIRD PARTY PLAINTIFF'S  
COMPLAINT AGAINST THIRD PARTY  
DEFENDANTS**

**(Jury Trial Demanded)**

Defendant/Third Party Plaintiff Charles A. Sides, by and through his attorney the Ghiorso Law Firm, appears in this matter, answers Plaintiff's First Amended Complaint, sets forth affirmative defenses, counterclaims, and sets forth Third Party claims against the above-captioned Third Party Defendants.

**ANSWER**

1.

Defendant/Third Party Plaintiff (hereinafter "Sides") admits paragraphs 1,2,4

2.

Sides denies paragraphs 5,6,7

1  
2 3.

3 With respect to paragraph 3 of Plaintiff's First Amended Complaint, Sides admits that he  
4 signed a promissory note, which is attached as Exhibit 1 to Plaintiff's First Amended Complaint,  
5 but Sides is without sufficient information to admit or deny whether the note was assigned, and  
6 to whom it was assigned to.

7  
8 **AFFIRMATIVE DEFENSES**

9 **FIRST AFFIRMATIVE DEFENSE**

10 (Accord and Satisfaction)

11 For his First Affirmative Defense, Sides alleges:

12 4.

13 Third Party Defendant Bradley Pence, (hereinafter "Mr. Pence") approached Sides about  
14 helping him invest his own money in his business, on or about November 6, 2008. Mr. Pence  
15 disclosed to Sides that his wife, Third Party Defendant Pamela Pence (hereinafter "Ms. Pence")  
16 would not allow Mr. Pence to invest any further money into Third Party Defendant KB Pacific  
17 LLC (hereinafter "KB Pacific").

18 5.

19 Mr. Pence suggested to have Mr. Sides receive funds, and then use those funds to divert  
20 into KB Pacific.

21 6.

22 In exchange for diverting those funds into KB Pacific LLC, Mr. Pence was to indemnify  
23 and hold harmless Mr. Sides from any repayment of the note which is the subject of Plaintiff's  
24 Complaint in this matter, and Mr. Pence further promised to provide business from KB Pacific  
25 LLC to a company of Sides. At no time was Sides to expect repayment from KB Pacific, nor  
was Mr. Pence to expect repayment from Sides.

7.

Contemporaneously with receiving the funds described in Plaintiff's Complaint, Sides issued a check to KB Pacific, a copy of which is attached to this pleading as Exhibit "A" and incorporated fully herein by this reference.

8.

Sides and Mr. Pence executed at the same time as the payment set forth in paragraph 7, a note from KB Pacific LLC to Sides, a copy of which is attached to this pleading as Exhibit "B" and incorporated fully herein by this reference.

9.

By complying in full with Pence's offer set forth above, Sides discharged any duty owed to Pence.

**SECOND AFFIRMATIVE DEFENSE**  
(Delegation)

For his Second Affirmative Defense, Sides alleges:

10.

Sides incorporates paragraphs 4 through 9, and paragraphs 12 through 64, and incorporates the same herein, as if set forth fully verbatim, as applicable.

11.

Mr. Pence, in having Sides immediately reroute the money given to him, assented to Sides delegation of his duty of repayment of the obligation set forth in Plaintiff's complaint to KB Pacific, rendering Sides with nothing left to perform, and no obligation to Plaintiff.

**THIRD AFFIRMATIVE DEFENSE**  
(Real Party in Interest)

For his Third Affirmative Defense, Sides alleges:

12.

Sides incorporates paragraphs 4 through 11, and paragraphs 14 through 64, and incorporates the same herein, as if set forth fully verbatim, as applicable.

13.

Sides derived no benefit from the funds forwarded to him, and for the reasons set forth above, KB Pacific is the real party in interest against whom this suit should be brought.

**FOURTH AFFIRMATIVE DEFENSE**  
(Failure of a Condition Precedent)

For his Fourth Affirmative Defense, Sides alleges:

14.

Sides incorporates paragraphs 4 through 13, and paragraphs 17 through 64, and incorporates the same herein, as if set forth fully verbatim, as applicable.

15.

In the agreements set forth above, repayment of the obligation from KB Pacific to Sides was a condition precedent to Sides' obligation, if any, to repay the obligation to Plaintiff's assignor.

16.

At no time since executing that note set forth in Exhibit "B" to this pleading, has KB Pacific paid, in part or in total, the obligation owing to Sides.

**FIFTH AFFIRMATIVE DEFENSE**  
(Unclean Hands)

For his Fifth Affirmative Defense, Sides alleges:

17.

Sides incorporates paragraphs 4 through 16, and paragraphs 19 through 64, and incorporates the same herein, as if set forth fully verbatim, as applicable.

//

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//

//

18.

Plaintiff has brought suit when its principal, Mr. Pence, has engaged in the activity set forth above, and with full knowledge that Sides received no benefit, and only constructive, nominal, control of the sums demanded; and further knowledge that Mr. Pence's own business interests were the direct beneficiary of the sums, and with even further knowledge that KB Pacific has never performed in part or in whole in repaying the sums it has received as set forth in Exhibits "A" and "B" of this pleading.

**SIXTH AFFIRMATIVE DEFENSE**  
(Lack of Consideration)

For his Sixth Affirmative Defense, Sides alleges:

19.

Sides incorporates paragraphs 4 through 18, and paragraphs 21 through 64, and incorporates the same herein, as if set forth fully verbatim, as applicable.

20.

Mr. and Ms. Pence, as assignors of Plaintiff, provided no consideration to Sides under the set of notes executed by the parties, specifically in that the terms of the note set forth in Plaintiff's Complaint provides no further advantage to Sides than what he was to receive from KB Pacific under Exhibit "B" to this pleading.

**SEVENTH AFFIRMATIVE DEFENSE**  
(Fraud in the Inducement)

For his Seventh Affirmative Defense, Sides alleges:

21.

Sides incorporates paragraphs 4 through 20, and paragraphs 26 through 64, and incorporates the same herein, as if set forth fully verbatim, as applicable.

22.

Mr. Pence made material misrepresentations to Sides prior to engaging Sides to execute the two notes on or about November 6, 2008, set forth in the following non-exclusive list of particulars:

- a) That KB Pacific would be fit to repay the \$100,000.00 advanced by Pence;
- b) That KB Pacific would be financially able to contract for lumber services from mills owned by Sides in the near future;
- c) That KB Pacific carried the cooperation of its bank, Wells Fargo, in financially reorganizing the company; and,
- d) That KB Pacific could be sold in part or in whole to Sides if he cooperated with Mr. Pence in executing the notes as set forth above.

23.

Mr. Pence had reason to know the representations set forth in paragraph 22 of this pleading were false.

24.

Sides reasonably relied on the misrepresentations set forth in paragraph 22 of this pleading, to his detriment, when he executed those notes.

25.

The misrepresentations set forth in paragraph 22 of this pleading were material to Sides entering the contracts set forth herein.

//

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//

**EIGHTH AFFIRMATIVE DEFENSE**  
(Innocent Misrepresentation)

For his Eighth Affirmative Defense, Sides alleges:

26.

Sides incorporates paragraphs 4 through 25, and paragraphs 30 through 64, and incorporates the same herein, as if set forth fully verbatim, as applicable.

27.

Mr. Pence made material misrepresentations to Sides prior to engaging Sides to execute the two notes on or about November 6, 2008, set forth in the following non-exclusive list of particulars:

- a) That KB Pacific would be fit to repay the \$100,000.00 advanced by Pence;
- b) That KB Pacific would be financially able to contract for lumber services from mills owned by Sides in the near future;
- c) That KB Pacific carried the cooperation of its bank, Wells Fargo, in financially reorganizing the company; and,
- d) That KB Pacific could be sold in part or in whole to Sides if he cooperated with Mr. Pence in executing the notes as set forth above.

28.

Sides reasonably relied on the innocent misrepresentations set forth in paragraph 27 of this pleading, to his detriment, when he executed those notes.

29.

The misrepresentations set forth in paragraph 27 of this pleading were material to Sides entering the contracts set forth herein.

//

//

**NINTH AFFIRMATIVE DEFENSE**  
(Mutual Mistake)

For his Ninth Affirmative Defense, Sides alleges:

30.

Sides incorporates paragraphs 4 through 29, and paragraphs 33 through 64, and incorporates the same herein, as if set forth fully verbatim, as applicable.

31.

Mr. Pence and Sides discussed, and assumed to be true a number of material assumptions, prior to engaging Sides to execute the two notes on or about November 6, 2008, set forth in the following non-exclusive list of particulars:

- a) That KB Pacific would be fit to repay the \$100,000.00 advanced by Pence;
- b) That KB Pacific would be financially able to contract for lumber services from mills owned by Sides in the near future;
- c) That KB Pacific carried the cooperation of its bank, Wells Fargo, in financially reorganizing the company; and,
- d) That KB Pacific could be sold in part or in whole to Sides if he cooperated with Mr. Pence in executing the notes as set forth above.

32.

The misrepresentations set forth in paragraph 31 of this pleading were material to Sides entering the contracts set forth herein. When such material assumptions in fact were not true, the purpose of the contract was frustrated.

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**THIRD PARTY COMPLAINT**

For his Third Party Complaint, Sides alleges generally:

33.

Sides incorporates paragraphs 4 through 29, and paragraphs 38 through 64, and incorporates the same herein, as if set forth fully verbatim, as applicable.

34.

At all times material herein, Mr. Pence was a resident of Marion County Oregon.

35.

At all times material herein, Ms. Pence was a resident of Marion County Oregon.

36.

At all times material herein, KB Pacific was an Oregon Limited Liability Company, with regular and sustained business activities in Marion County, Oregon.

37.

All events pled herein occurred in conjunction with, and arose out of, the note alleged to be due and owing in Plaintiff's Complaint in this matter.

**FIRST CLAIM FOR RELIEF**  
(Breach of Contract)

For his First Claim for Relief, Sides alleges:

**Common to All Counts**

38.

Sides incorporates paragraphs 4 through 37, and paragraphs 51 through 64, and incorporates the same herein, as if set forth fully verbatim, as applicable.

39.

Sides is entitled to prevailing party fees, pursuant to ORS 20.190, costs and disbursements pursuant to ORCP 68, and pre- and post-judgment interest pursuant to Exhibit "B" and ORS 82.010 and reasonable attorney fees pursuant to Exhibit "B."

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**Count 1**  
**(KB Pacific)**

39.

As set forth above, Sides immediately transferred the \$100,000.00 received from Mr. and Ms. Pence, and forwarded the same to KB Pacific as set forth in Exhibits "A" and "B" to this pleading.

40.

KB Pacific has materially breached the contract when it failed in any event to pay back the note, or any part thereof.

41.

Sides has not breached the contract in any way and has fully performed under the contract.

42.

Sides has suffered damages in the form of foregone interest, principle, and all other indebtedness evidenced by Exhibit "B."

**Count 2**  
**(Ms. Pence)**

43.

Upon information and belief, Ms. Pence is a principle and owner of KB Pacific.

44.

As a principle and owner of KB Pacific, Ms. Pence knew, or in the exercise of reasonable care should have known, that her business was in material default to Sides, that the funds Sides received were immediately redistributed to her business, and that Sides had discharged whatever duties, if any, he had to her.

45.

As set forth above, Sides' has already performed fully under the note referenced in Plaintiff's Complaint, and further any payment from Sides to Ms. Pence was conditioned upon KB Pacific's payment to Sides.

46.

By bringing suit to enforce the terms of one note, in the absence of performance of Ms. Pence's company on the other note, performance which was a condition precedent to the discharge of Sides duties, Ms. Pence materially breached the terms of the agreement set forth in Plaintiff's complaint.

**Count 3  
(Mr. Pence)**

47.

Mr. Pence is a principle and owner of KB Pacific.

48.

As a principle and owner of KB Pacific, Ms. Pence knew, or in the exercise of reasonable care should have known, that her business was in material default to Sides, that the funds Sides received were immediately redistributed to her business, and that Sides had discharged whatever duties, if any, he had to her.

49.

As set forth above, Sides' has already performed fully under the note referenced in Plaintiff's Complaint, and further any payment from Sides to Mr. Pence was conditioned upon KB Pacific's payment to Sides and/or discharged Sides' duty under that contract.

50.

By bringing suit to enforce the terms of one note, in the absence of performance of Mr. Pence's company on the other note, performance which was a condition precedent to the discharge of Sides duties, Mr. Pence materially breached the terms of the agreement set forth in Plaintiff's complaint.

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**SECOND CLAIM FOR RELIEF**

(Disregard of Corporate Entity)

For his Second Claim for Relief, Sides alleges:

51.

Sides incorporates paragraphs 4 through 50, and paragraph 55 through 64, and incorporates the same herein, as if set forth fully verbatim, as applicable.

52.

Upon information and belief, Defendants Mr. and Ms. Pence were the sole shareholders or members of KB Pacific.

53.

Upon information and belief, Defendants Mr. and Ms. Pence exercised improper dominion and control over KB Pacific, in the following list of non-exclusive particulars:

- a) By treating the entity's assets as their own;
- b) By improperly "milking" the entity's assets to leave the entity without sufficient funds to meet its obligations; and,
- c) By failing to follow corporate formalities;

54.

As a direct and proximate cause of Mr. and Ms. Pence's conduct set forth in paragraph 53 of this pleading, Sides has been left without a meaningful remedy against KB Pacific.

**THIRD CLAIM FOR RELIEF**

(Promissory Estoppel, Detrimental Reliance)

For his Third Claim for Relief, Sides alleges:

55.

Sides incorporates paragraphs 4 through 54, and paragraphs 60 through 64, and incorporates the same herein, as if set forth fully verbatim, as applicable.

56.

In or around November 6, 2008, Sides was promised by Mr. Pence that KB Pacific LLC would contract with a business entity of Sides, if he agreed to pass Mr. Pence's personal monies through to KB Pacific LLC, as set forth above herein.

57.

In reasonable reliance on the promise set forth in paragraph 56 of this pleading, Sides did pass the money through to KB Pacific LLC, as set forth above.

58.

Sides has relied to his detriment on Mr. Pence's promise, as he has failed to ever collect on the sums from KB Pacific LLC, understanding from Mr. Pence's promise that he was never to collect from KB Pacific LLC, because Mr. Pence would pay himself back.

59.

Sides is entitled to prevailing party fees, pursuant to ORS 20.190, costs and disbursements pursuant to ORCP 68, and pre- and post-judgment interest pursuant to ORS 82.010; and reasonable attorney fees pursuant to Exhibit "B."

**FOURTH CLAIM FOR RELIEF**  
(Unjust Enrichment)

For his Fourth Claim for Relief, Sides alleges:

60.

Sides incorporates paragraphs 4 through 59, and incorporates the same herein, as if set forth fully verbatim, as applicable.

61.

When Sides assisted Mr. Pence in diverting monies into KB Pacific as alleged herein, he conferred a benefit upon Mr. Pence.

//

62.

Mr. Pence, in failing to ever divert the funds back from KB Pacific to himself, to satisfy the arrangement he made with Sides, was enriched by the benefit Sides conferred upon him.

63.

In equity, it would be unjust for Mr. Pence to not have to disgorge any benefit he received from Sides on account of the transactions alleged herein.

64.

Sides is entitled to prevailing party fees, pursuant to ORS 20.190, costs and disbursements pursuant to ORCP 68, and pre- and post-judgment interest pursuant to ORS 82.010; and reasonable attorney fees pursuant to Exhibit "B."

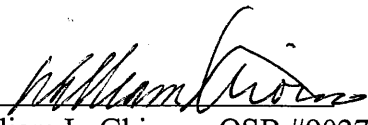
WHEREFORE, Defendant/Third Party Plaintiff Sides requests from the court the following relief:

- a) That Plaintiff take nothing and its claims be dismissed in their entirety;
- b) For his attorney fees expended in defending Plaintiff's suit herein;
- c) That Defendant/Third Party Plaintiff be awarded:
  - i. Damages, in the form of principle, in an amount to be determined at trial, but in any event not to exceed \$100,000.00;
  - ii. Pre- and Post-Judgment interest pursuant to Exhibit "B" and ORS 82.010;

- 1                   iii. Prevailing Party fees, pursuant to ORS 20.190;  
2                   iv. Attorney fees pursuant to Exhibit "B";  
3                   v. Costs and Disbursements, pursuant to ORCP 68; and,

4           d) Any other relief the court deems just and equitable.

5           DATED: September 26<sup>th</sup>, 2011.  
6

7  
8   By:   
9   William L. Ghiorso, OSB #902706  
10    The Ghiorso Law Firm  
11    495 State Street, Suite 500  
12    Salem, OR 97301  
13    Phone: (503) 362 – 8966  
14    Fax:     (503) 362 – 1158  
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96-7638/3232

CHARLES A SIDES  
2555 HOLLYWOOD DR NE  
SALEM, OR 97301

DATE \_\_\_\_\_

11/06/08

001000

52 RICHARD  
53 JENNIFER  
54 JENNIFER

100 DOLLARS

Pay to the order of KB Pacific, LLC  
One Hundred Thousand and No/100

President's Club

**Marion & Polk Schools Credit Union**  
P.O. Box 12398 • Salem, OR 97309  
503.588.0181 or 800.688.0181  
[www.mapscu.com](http://www.mapscu.com)

192327638801000707111555

PROMISSORY NOTE

November 4, 2008

\$ 200,000.00

BORROWER: KB Pacific, LLC

LENDER: Charles A Sides

**Promise to Pay.** For value received, the undersigned Borrower promises to pay to the order of the Lender in lawful money of the United States and immediately available funds, any sums advanced under this Note plus interest on the unpaid portion of the principal sum and all Expenses (defined below).

**Nature of Facility.** Subject to the terms and conditions of this Note, Lender agrees to lend to Borrower on a revolving basis such sums as Borrower may from time to time request, subject to the limitation set forth below, not to exceed in the aggregate at any one time outstanding the sum of TWO HUNDRED THOUSAND DOLLARS (\$200,000.00). Within such limits of time and amount, Borrower may borrow, in installments of 100,000.00 on two consecutive weeks as needed.

**Advances Under Revolving Loan.** Advances by Lender under this Note shall be made by deposits or wire transfers of immediately-available funds pursuant to wire transfer instructions to be delivered by Borrower to Lender. Each Request for an Advance must be accompanied by such financial information as may be requested by Lender, which information must be acceptable to Lender in its sole and absolute discretion. The intended use of the Advance will be to provide working capital to Keith Brown Building Materials (KB) in anticipation of a pending acquisition deal between KB and Mr. Sides. Lender shall have no obligation to make any Advance if any Event of Default exists or any condition or event exists that, with notice, the passage of time or both, would constitute an Event of Default. Any fees, charges or expenses charged to Lender by any other bank for transferring Advances made by Lender pursuant to a Request must be paid by Borrower and shall be charged against this Note as accrued, as a debit to the ledger.

**Interest.** The Borrower shall pay to the Lender interest, calculated on the basis of a 360-day year for the actual number of days of each year (365 or 366) as follows:

From and including the date the proceeds of this Note are disbursed to and not including the Maturity Date (defined below), the outstanding principal sum shall accrue interest at an interest rate of eight percent (8%) per annum.

**Maximum Legal Rate.** It is the intent of the Lender and the Borrower that in no event shall such interest be payable at a rate in excess of the maximum rate permitted by applicable law (the "Maximum Legal Rate"). Solely to the extent necessary to prevent interest under this Note from exceeding the Maximum Legal Rate, any amount that would be treated as excessive under a final judicial interpretation of applicable law shall be deemed to have been a mistake and automatically canceled and if received by the Lender shall be refunded to the Borrower.

**Default Rate.** Upon and after the Maturity Date of the occurrence or existence of an Event of Default, the interest rate on the unpaid principal sum shall be increased to five percent (5%) per year above the otherwise applicable rate per year, effective as of the date of the default or maturity. No failure to impose

or delay in imposing this Default Rate shall be construed as a waiver by the Lender of its right to collect interest at the Default Rate for the period from the Maturity Date of the commencement of the default, as applicable, to but not including the earlier of the date (a) the default is cured to the satisfaction of the Lender in its sole discretion; or (b) this Note is paid in full.

**Term.** This Note shall be paid in full with principle and interest at the time of the funding and proposed acquisition of stock in Keith Brown Building Materials if not otherwise paid the Maturity Date of this Note shall be January 31, 2009

**Repayment.** Borrower shall pay to Lender in full all accrued and unpaid principal, interest, and Expenses on the Maturity Date.

**Late Charge.** If the Borrower fails to pay within ten (10) days of its due date any amount owing pursuant to this Note, the Borrower shall immediately pay to the Lender a late charge equal to five percent (5%) of the delinquent amount.

**Application of Payments.** Each payment pursuant to this Note shall be applied first to accrued and unpaid interest, next to Principal, next to late charges, and finally to Expenses.

**Events of Default; Acceleration.** In the event of Default under this Note all amounts under this Note shall become immediately due and payable without any notice, demand, presentment or protest of any kind (each of which is waived by the Borrower) (a) if the Borrower commences any bankruptcy or insolvency proceeding, in voluntary, and upon the lapse of sixty (60) days without dismissal if involuntary; (b) at the sole option of the Lender, upon or at any time or from time to time after the occurrence or existence of any other event or condition of Default and the passage of any applicable grace period; and (c) at the sole option of the Lender, upon or at any time after the Maturity Date, regardless of whether the Lender has accepted any partial payments subsequent to the Maturity Date.

**Authorized Representative.** This Note is issued by Borrower to Lender in connection with a loan limit made available by Lender to Borrower (the "Credit"). Lender may make any advance pursuant to the Credit (the 'Advance(s)') in reliance upon any oral, telephonic, written, tele-transmitted or other request (the 'Request(s)') that Lender in good faith believes to be valid and to have been made by Borrower or on behalf of Borrower by an authorized person. Lender may act on the Request of such a person until Lender shall have received from Borrower, and had a reasonable time to act on, written notice revoking the authority of such person. Lender shall incur no liability to Borrower or to any other person as a direct or indirect result of making any Advance pursuant to this paragraph.

**Lender Records Conclusive.** Lender shall set forth on a schedule maintained on a computer, the date and original principal amount of each Advance, the date and amount of any fees, charges or expenses debited against this Note. No failure by Lender to make, and no error by Lender in making, any annotation on any such schedule shall affect Borrower's obligation to pay the principal and interest of each Advance or any other obligation of Borrower to Lender pursuant to this Note.

**Purpose.** Borrower certifies that all Advances shall be used by Keith Brown Building Materials for working capital, and not for any personal, or any other business purpose.

**Expenses.** The Borrower shall pay to the Lender or its agents on demand each cost and expense (including, but not limited to, the reasonable fees and disbursements of counsel to the Lender or its agents, whether internal or external and whether retained for advice, for litigation or for any other purpose) incurred by the Lender or its agents either directly or indirectly in connection with this Note including, without limitation, endeavoring to(1) collect any amount owing pursuant to this Note or

negotiate or document a workout or restructuring; (2) enforce or realize upon any guaranty, endorsement or other assurance, any collateral or other security, or any subordination, directly or indirectly securing or otherwise directly or indirectly applicable in any such amount; or (3) preserve or exercise any right or remedy of the Lender or its agents pursuant to this Note (collectively, the "Expenses")

**Joint and Several.** If the Borrower is more than one legal person, each such person is jointly and severally liable for all amounts which become due under this Note, and the term "Borrower" shall include each as well as all of them.

**Cumulative Nature of the Lender's Rights and Remedies.** All rights and remedies of the Lender under applicable law, this Note or any related agreement, guaranty or other document are cumulative and not exclusive. No single, partial or delayed exercise by the Lender of any right or remedy shall preclude subsequent exercise by the Lender at any time of any right or remedy of the Lender without notice. No course of dealing or other conduct, no oral agreement or representation made by the Lender or usage of trade shall operate as a waiver of any right or remedy of the Lender. No waiver of any provision of this Note shall be effective unless made specifically in writing by the Lender.

**Miscellaneous.** This Note, and related security agreements, guaranties and notes, contains the entire agreement between the Lender and the Borrower with respect to this Note and supersedes every course of dealing, other conduct, oral agreement and representation previously made by the Lender. No amendment of any provision of this Note shall be effective unless specifically agreed to in writing by the Lender and the Borrower. This Note shall be governed by the laws of the State of Oregon, without regard to its principles of conflict of laws. This Note is a binding obligation enforceable against the Borrower and its successors and assigns and shall inure to the benefit of and be enforceable by the Lender and its successors, assigns and its agents. If a court deems any provision of this Note invalid, the remainder of this Note shall remain in effect. Section headings are for convenience only. Singular number includes plural and neuter gender includes masculine and feminine as appropriate.

**Borrower's Waivers and consents.** In any action or other legal proceeding relating to this Note, the Borrower (1) consents to the personal jurisdiction of any state or federal court located in the State of Oregon; and (2) agrees that in any legal proceeding, a copy of this Note kept in the Lender's course of business may be admitted into evidence as an original.

**Statutory Notice.** UNDER OREGON LAW, MOST AGREEMENTS, PROMISES AND COMMITMENTS MADE BY US AFTER OCTOBER 3, 1989, CONCERNING LOANS AND OTHER CREDIT EXTENSIONS WHICH ARE NOT FOR PERSONAL, FAMILY OR HOUSEHOLD PURPOSES OR SECURED SOLELY BY THE BORROWER'S RESIDENCE MUST BE IN WRITING, EXPRESS CONSIDERATION AND BE SIGNED BY US TO BE ENFORCEABLE.

BORROWER:

KB Pacific, LLC

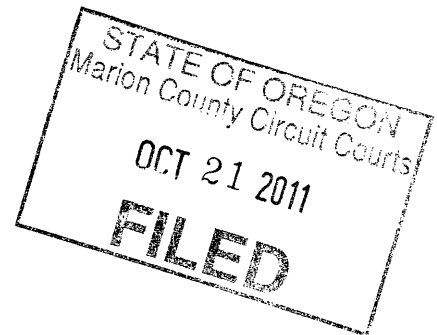
By: 

Its: CFO

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ENTERED  
OCT 21 2011  
#25



IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MARION

P & B PENCE, LLC, an Oregon limited liability  
company, also with an assumed name PBPC,

Plaintiff,

v.

CHARLES A. SIDES,

Defendant/Third-Party Plaintiff

v.

KB PACIFIC, LLC, an Oregon Limited Liability  
Company, BRAD PENCE, and PAMELA  
PENCE,

Third-Party Defendants.

Case No. 11C-20216

Judge Claudia Burton

**PLAINTIFF'S REPLY TO DEFENDANT'S  
RESPONSE TO PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT**

Plaintiff files this Reply to Defendant's Memorandum and Declaration by Charles Sides opposing Plaintiff's Motion for Summary Judgment. This Reply is supported by the separately filed Declaration of Bradley Pence, a copy of which is attached. The original will be filed when received.

Simply stated, Defendant Charles Sides has made up a story about what actually happened trying to duck or delay payment of the Promissory Note in this case he signed and has repeatedly affirmed he owes.

Plaintiff is filing a Declaration by Bradley Pence so the court is informed under oath by Mr. Pence about the falsity of Mr. Sides' Declaration. Plaintiff will also be evaluating whether to proceed with its request for oral argument on the Motion for Summary Judgment based on the flurry

Page 1 – Plaintiff's Reply to Defendant's Response to Plaintiff's Motion for Summary Judgment

**TERRENCE KAY, P.C.**

*Attorney at Law*

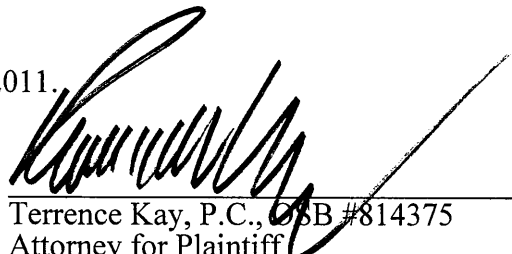
3155 River Road S., Suite 150 - Salem, OR 97302

Telephone: 503/588-1944 Fax: 503/588-1946

E-mail: [terrence@kaylawfirm.com](mailto:terrence@kaylawfirm.com)

1 of defenses and cabbaged together allegations and false statements in Mr. Sides fabricated story and  
2 will inform the Court whether oral argument should occur before further filings and discovery  
3 occurs.

4 Dated this 20 day of October 2011.

5   
6 Terrence Kay, P.C., OSB #814375  
7 Attorney for Plaintiff  
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5 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
6 FOR THE COUNTY OF MARION

7 P & B PENCE, LLC, an Oregon limited liability  
8 company, also with an assumed name PBPC,

9 Plaintiff,

10 v.

11 CHARLES A. SIDES,

12 Defendant/Third-Party Plaintiff

13 v.

14 KB PACIFIC, LLC, an Oregon Limited Liability  
15 Company, BRAD PENCE, and PAMELA  
16 PENCE,

17 Third-Party Defendants

Case No. 11C-20216

Judge Claudia Burton

**DECLARATION OF BRADLEY PENCE  
IN SUPPORT OF PLAINTIFF'S REPLY  
TO DEFENDANT'S OPPOSITION TO  
SUMMARY JUDGMENT**

18 I, Bradley Pence, hereby declare:

19 1. I am a Member of the Plaintiff P & B Pence, LLC, an Oregon limited liability company,  
20 and make this Declaration on my personal knowledge.

21 2. I have read the Declaration of Charles A. Sides which he signed September 30, 2011. I am  
22 not responding at this time to each statement in Mr. Sides Declaration but that should not be  
23 interpreted to mean I agree with Mr. Sides who has fabricated a story apparently trying to avoid  
24 paying the Promissory Note he has repeatedly admitted he owes. Let me explain some background.

25 3. For several months in 2008 before Mr. Sides borrowed the \$100,000, he personally  
26 discussed purchasing from me the majority ownership of Keith Brown Building Materials, which

Page 1 –Declaration of Bradley Pence in Support of Plaintiff's Reply to Defendant's Opposition to  
Summary Judgment

C:\WP\PENCE-BRAD\DeclBP101411.1su.doc

TERRENCE KAY, P.C.

Attorney at Law

3155 River Road S., Suite 150 - Salem, OR 97302

Telephone: 503/588-1944 Fax: 503/588-1946

E-mail: [terrence@kaylawfirm.com](mailto:terrence@kaylawfirm.com)

1 involved KB Pacific, LLC. I will refer to this as Keith Brown, the name which most people have  
2 known for decades. Chuck Sides wanted to buy the majority ownership of Keith Brown to  
3 compliment a lumber mill or operation he had or was buying. Chuck Sides has been involved in  
4 many business ventures and made many deals and for this one he received various financial reports  
5 about Keith Brown to evaluate. In the fall of 2008, the financial condition of Keith Brown had  
6 declined and Mr. Sides was willing to loan \$100,000 to KB Pacific, LLC for the Keith Brown  
7 business to assist in keeping Keith Brown operating while he continued putting together purchase of  
8 the majority ownership in Keith Brown.

9 4. When we loaned Chuck Sides the \$100,000 and he signed that Promissory Note dated  
10 November 6, 2008, I did not state and Mr. Sides did not ask that he be held harmless from any  
11 obligation to repay that Promissory Note. Before Mr. Sides signed the \$100,000 Promissory Note he  
12 did not ask for a provision or even write a provision into the Promissory Note for my wife and me  
13 that he would only have to repay that Note if Keith Brown repaid him or only if he was able to  
14 complete his purchase of the majority ownership in Keith Brown.

15 5. After Keith Brown began to wind down its business beginning December 2008, Mr. Sides  
16 never told me then or in any of a number of later discussions that he did not owe the \$100,000 to us.  
17 In fact, a number of times since Keith Brown ceased doing business Mr. Sides and I have personally  
18 discussed him repaying this \$100,000 Note and he never once denied he was obligated to repay it, in  
19 fact he continued to say he owed it. He affirmed his debt to us again in writing this year by signing  
20 the March 10, 2011 letter labeled and attached as *Exhibit 2* to my Declaration dated August 24,  
21 2011, which has been filed with the court in this case.

22 6. When Mr. Sides was loaned the \$100,000 in November 2008, I did not tell him my wife  
23 "would not allow" me to invest more money into Keith Brown and did not tell him this loan was a  
24 conduit for me to further capitalize Keith Brown. The March 10, 2011 letter was given to Mr. Sides  
25 to document his repeated statements this loan is owed by him because he kept giving excuses or

26 Page 2 –Declaration of Bradley Pence in Support of Plaintiff's Reply to Defendant's Opposition to  
Summary Judgment

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TERRENCE KAY, P.C.

Attorney at Law

3155 River Road S., Suite 150 - Salem, OR 97302

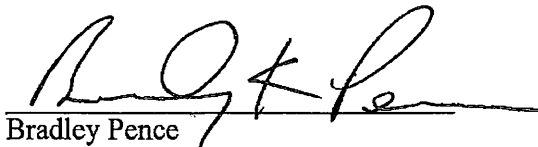
Telephone: 503/588-1944 Fax: 503/588-1946

E-mail: [terrence@kaylawfirm.com](mailto:terrence@kaylawfirm.com)

1 explanations why he needed to delay or take other steps to get money before repaying the \$100,000  
2 Note. When I asked Mr. Sides to sign this March 10, 2011 letter he was pleased to do so and said he  
3 owed the money. I did not tell him this letter was to continue the alleged conduit scheme Mr. Sides  
4 has fabricated.

5 I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF  
6 MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS  
EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

7 Dated this 18 day of October 2011.

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Bradley Pence